



## 31 CFR Part 35

RIN 1505-AC79

### State Small Business Credit Initiative; Demographics-Related Reporting Requirements

**AGENCY:** Department of the Treasury.

**ACTION:** Interim final rule.

**SUMMARY:** The Secretary of the Treasury is issuing this interim final rule to institute the reporting requirements related to demographics of those who own or control small businesses that receive a loan, investment, other credit or equity support, or technical assistance under the State Small Business Credit Initiative under the American Rescue Plan Act of 2021.

**DATES:** Effective date: This interim final rule is effective [INSERT DATE OF FILING FOR PUBLIC INSPECTION AT THE OFFICE OF THE FEDERAL REGISTER].

Comment date: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Please submit comments electronically through the Federal eRulemaking Portal:

<https://www.regulations.gov>. Comments can be mailed to the Office of Recovery Programs, Department of the Treasury, 1500 Pennsylvania Avenue NW, Washington, DC 20220. Because postal mail may be subject to processing delay, it is recommended that comments be submitted electronically. All comments should be captioned with “SSBCI Interim Final Rule Comments.” Please include your name, organization affiliation, address, email address and telephone number in your comment. Where appropriate, a comment should include a short executive summary. In general, comments received will be posted on <https://www.regulations.gov> without change, including any business or personal information provided. Comments received, including attachments and other supporting materials, will be part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

**FOR FURTHER INFORMATION CONTACT:** Jeff Stout, Director, Office of Federal Program Finance, at (202) 622-2059 or [ssbci\\_information@treasury.gov](mailto:ssbci_information@treasury.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The American Rescue Plan Act of 2021 (ARPA) reauthorized and amended the Small Business Jobs Act of 2010 (SBJA) to provide \$10 billion to fund the State Small Business Credit Initiative (SSBCI) as a response to the economic effects of the COVID-19 pandemic.<sup>1</sup> SSBCI is a federal program administered by the U.S. Department of the Treasury (Treasury) that was created to strengthen the programs of eligible jurisdictions that support private financing for small businesses. Eligible jurisdictions include states, territories, Tribal governments, and eligible municipalities. SSBCI is expected to, in conjunction with new small business financing, create billions of dollars in lending to, and investments in, small businesses.

**II. Summary of the Interim Final Rule**

*A. Authority, scope, and purpose.*

Treasury has authority under the SSBCI statute to issue a rule on collecting demographics-related data of those who own or control small businesses that participate in SSBCI for purposes of implementation, compliance and reporting, and understanding program outcomes.<sup>2</sup> First, issuing this interim final rule is important for the implementation of and compliance with the program requirements regarding allocations related to business enterprises that are owned and controlled by socially and economically disadvantaged individuals (SEDI-owned and controlled businesses). ARPA provides \$1.5 billion of capital funding to be allocated based on the needs of SEDI-owned and controlled businesses (SEDI allocation),<sup>3</sup> \$1.0 billion of capital funding for an incentive program for jurisdictions that demonstrate robust support for

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<sup>1</sup> ARPA, Pub. L. 117-2, sec. 3301, codified at 12 U.S.C. 5701 *et seq.* SSBCI was originally established in Title III of the Small Business Jobs Act of 2010.

<sup>2</sup> See 12 U.S.C. 5706, 5709.

<sup>3</sup> 12 U.S.C. 5702(d)(2).

SEDI-owned and controlled businesses in the deployment of previously allocated SSBCI capital funding (SEDI incentive allocation),<sup>4</sup> and \$500 million for technical assistance to, in part, SEDI-owned and controlled businesses.<sup>5</sup> ARPA also states that the \$1.5 billion SEDI allocation must be expended for SEDI-owned and controlled businesses.<sup>6</sup> The \$1.5 billion SEDI allocation and \$1.0 billion SEDI incentive allocation are intended to address the widespread challenges that these businesses have faced in light of the COVID-19 pandemic.<sup>7</sup> The technical assistance funding is to help, in part, SEDI-owned and controlled businesses that are applying to receive a loan, investment, or other credit or equity support under the SSBCI. The information reported under this interim final rule will help Treasury determine the extent to which SSBCI funds have been provided to SEDI-owned and controlled businesses.

Second, this interim final rule is being issued to ensure compliance with legal requirements related to nondiscrimination and nondiscriminatory uses of federal funds, where such laws are applicable to a participating jurisdiction and any contracted entity operating SSBCI programs on the jurisdiction's behalf because all SSBCI funds are considered federal financial assistance for purposes of such requirements. These legal requirements include, but are not limited to, Title VI of the Civil Rights Act of 1964 and Treasury's regulations at 31 CFR part 22, which require recipients of SSBCI funding to maintain and submit racial and ethnic data of beneficiaries that receive Federal financial assistance.<sup>8</sup>

Third, issuing this interim final rule is important for SSBCI implementation and compliance because some participating jurisdictions will partner with lenders or other financial entities that are subject to laws that prohibit these entities from inquiring about the race, color,

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<sup>4</sup> 12 U.S.C. 5702(e).

<sup>5</sup> 12 U.S.C. 5708(e).

<sup>6</sup> 12 U.S.C. 5702(d)(1).

<sup>7</sup> See, e.g., Cong. Rec. H1283 (Statement of Rep. Waters) (Mar. 10, 2021) (citing "the widespread challenges small businesses, especially minority-owned businesses, have faced during the COVID-19 pandemic"); Cong. Rec. H1280 (Statement of Speaker Pelosi) ("The most vulnerable among us have been the most disproportionately affected...women and minority-owned businesses forced to shudder [*sic*], communities of color facing rising disparities" and explaining "This legislation will, among other steps, address 8 in 10 minority owned businesses on the brink of closure....").

<sup>8</sup> 31 CFR 22.6(b),

religion, national origin, or sex of an applicant or any other person in connection with a credit transaction, unless such information is required by a regulation, order, or agreement issued by, or entered into with, an enforcement agency or a court to monitor or enforce compliance with federal or state statutes or regulations. For example, under 12 CFR part 1002 (Regulation B) implementing the Equal Credit Opportunity Act, creditors are generally prohibited from inquiring about the race, color, religion, national origin, or sex of an applicant or any other person in connection with a credit transaction, unless an exception applies.<sup>9</sup> One exception is for certain required information collection “to monitor or enforce compliance with the [Equal Credit Opportunity] Act, [Regulation B], or other Federal or state statutes or regulations.”<sup>10</sup> This interim final rule will facilitate the collection of information that might not otherwise be collected by creditors who will be SSBCI lenders. Treasury expects that, in accordance with this interim final rule, participating jurisdictions will contract with lenders and other financial entities to implement SSBCI programs and collect this information. Lenders and other financial entities participating in SSBCI must request the demographic information described in this interim final rule, and collect and report such information certified by authorized representatives of participating small businesses. Although such lenders and other financial entities must collect and report such information, participating small businesses have the option to choose “prefer not to respond” or to not respond by leaving the request blank. This interim final rule does not require verification of responses provided by participating small businesses. Treasury believes that requiring verification of small business-provided responses would greatly increase the operational burden of the interim final rule.

Finally, this interim final rule is important for understanding SSBCI program outcomes. Such information will allow Treasury to analyze and report on the populations that SSBCI funding is benefiting.

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<sup>9</sup> See 12 CFR 1002.5(b).

<sup>10</sup> 12 CFR 1002.5(a)(2).

## *B. Definitions and Reporting Requirements*

Under this interim final rule, each jurisdiction that participates in SSBCI must submit an annual report to Treasury that includes the following data: self-certified SEDI demographics-related business status; minority-owned or controlled business status; women-owned or controlled business status; veteran-owned or controlled business status; and the race, ethnicity, gender, sexual orientation, Middle Eastern or North African ancestry, and veteran status with which principal owners identify. For each business that receives a loan, investment, or other credit or equity support under the SSBCI, the reported data must be based on the ownership and control of the business immediately before the consummation of such loan, investment, or other credit or equity support-related transaction. For each business that receives technical assistance under the SSBCI, the reported data must be based on the ownership and control of the business at the time it receives such technical assistance. The self-certified SEDI demographics-related business status variable reflects one group of SEDI-owned and controlled businesses on which jurisdictions may expend their portion of the \$1.5 billion SEDI allocation and their portion of technical assistance funding.<sup>11</sup> Loan, investment, or other credit or equity support-related transactions conducted with self-certified SEDI demographics-related businesses may also count toward earning a participating jurisdiction's portion of the \$1.0 billion SEDI incentive allocation. The definition of "owned and controlled," which is used in the definition of SEDI demographics-related business, is based on the statutory definition of "business enterprise owned and controlled by socially and economically disadvantaged individuals," which includes prongs for three types of organizations: private businesses, public businesses, and mutual institutions.<sup>12</sup> For example, 51 percent ownership of a private institution is a sufficient condition to fulfill the ownership-and-control requirement for a business to be a self-certified SEDI demographics-related business.

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<sup>11</sup> For more information on all eligible groups of businesses on which jurisdictions may expend their SSBCI SEDI allocation funds, please see the SSBCI Capital Program Policy Guidelines published on Treasury's website.

<sup>12</sup> See 12 U.S.C. 5701(15).

Under this interim final rule, Treasury will also collect information on whether the business is majority-owned or controlled by minority individuals, females, or veterans. These data elements do not affect the determination of SEDI-owned and controlled business status. The SSBCI statute does not define “owned or controlled” for purposes of these categories. Therefore, the definition of “owned or controlled” for purposes of these terms are based both on the definition of “business enterprise owned and controlled by socially and economically disadvantaged individuals” in the SSBCI statute<sup>13</sup> and also on the control prong of the definition of “beneficial owner” in the Financial Crimes Enforcement Network’s (FinCEN) customer due diligence (CDD) rule, which requires covered financial institutions to establish and maintain written procedures that are reasonably designed to identify and verify beneficial owners of legal entity customers.<sup>14</sup> In choosing this approach, Treasury considered that the “beneficial owner” definition under FinCEN’s CDD rule is already widely in use, and that most financial institutions are likely familiar with the standard, because many of them are required to comply with the CDD rule. Accordingly, a business can be a minority-owned or controlled business, women-owned or controlled business, or veteran-owned or controlled business (as applicable) if (1) the applicable prong under the definition of “owned and controlled” explained above is met or (2) one or more minority individuals, females, or veterans, respectively, have the power to exercise a controlling influence over the management, direction, or policies of the business.

Under this interim final rule, Treasury will further collect the race, ethnicity, gender, sexual orientation, Middle Eastern or North African ancestry, and veteran status with which the principal owners of all businesses that participate in SSBCI transactions that occurred in the preceding calendar year identify. These data elements also do not affect the determination of SEDI-owned and controlled business status. Treasury defines the term “principal owner” based on the ownership prong of the definition of beneficial ownership under FinCEN’s CDD rule.

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<sup>13</sup> See *id.*

<sup>14</sup> See 31 CFR 1010.230(d)(1).

Under this interim final rule, an individual is a principal owner if the individual directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, owns 25 percent or more of the equity interests of the business.

The categories of responses related to gender under this interim final rule are female, male, non-binary, an option for “prefer to self-describe” with a write-in field that allows for identification in a different manner, “prefer not to respond,” and that the business did not answer. In considering this approach, Treasury reviewed the following information. The Census Bureau’s Household Pulse Survey includes questions on sex and gender identity. One of these questions asks, “What sex were you assigned at birth, on your original birth certificate?” with responses including male or female. Another question asks, “Do you currently describe yourself as male, female, or transgender?” with responses including male, female, transgender, or none of these.<sup>15</sup> The Department of Defense P1 survey includes a question that asks, “Are you...?” with responses that include male or female.<sup>16</sup> The U.S. Department of Agriculture’s Farm Producer Study includes a question that asks “How do you currently describe yourself?” with responses that include male, female, transgender, and none of these, specify (with a space to write-in). The same study also includes a question that asks, “Was your sex recorded as male or female at birth?” with responses that include male or female.<sup>17</sup>

The Consumer Financial Protection Bureau’s proposed rule for the collection of small business data asks for information on the sex of the principal owner with the response options of female, male, I prefer to self-identify as (with a space to write in), and I do not wish to provide this information.<sup>18</sup> Treasury’s approach is most consistent with the Consumer Financial Protection Bureau’s proposed rule for collection of small business data in that Treasury includes

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<sup>15</sup> U.S. Census Bureau, *Phase 3.3 Household Pulse Survey*, available at [https://www2.census.gov/programs-surveys/demo/technical-documentation/hhp/Phase3-3\\_Questionnaire\\_12\\_01\\_21\\_English.pdf](https://www2.census.gov/programs-surveys/demo/technical-documentation/hhp/Phase3-3_Questionnaire_12_01_21_English.pdf).

<sup>16</sup> Department of Defense, *P1 Survey*, available at <https://www.reginfo.gov/public/do/DownloadDocument?objectID=112827001>.

<sup>17</sup> U.S. Department of Agriculture, 2021 Farm Producer Study, available at <https://omb.report/icr/202109-0535-001/doc/114843800>.

<sup>18</sup> Small Business Lending Data Collection Under the Equal Credit Opportunity Act (Regulation B), 86 FR 56356, 56582 (Oct. 8, 2021).

response options of female, male, an option for “prefer to self-describe” with a write-in field (which is similar to the Consumer Financial Protection Bureau proposed rule’s I prefer to self-identify as (with a space to write in)), and an option for “prefer not to respond.” Treasury also includes “non-binary” as a response in order to provide some consistency with other Treasury coronavirus relief programs, such as the Emergency Rental Assistance Program, which collects data on whether award recipients are female, male, non-binary, declined to answer, or data not collected.<sup>19</sup> As businesses may elect to not choose any of the aforementioned responses by leaving the responses blank, Treasury also provides jurisdictions the option to report “the business did not answer.”

In addition, Treasury will collect data regarding the sexual orientation status with which principal owners identify with response options of gay or lesbian; bisexual; straight, that is, not gay, lesbian, or bisexual; something else; an option for the business to choose that it prefers not to respond; or that the business did not answer. Treasury is collecting this information related to sexual orientation to better understand the demographics of the principal owners of businesses receiving SSBCI funds. The collection of this information is expected to provide valuable insights on SSBCI program outcomes and small business ecosystems, along with the performance of businesses owned by individuals who identify as lesbian, gay, or bisexual.

In considering this approach, Treasury reviewed the following information. The Census Bureau’s Household Pulse Survey includes a question on sexual orientation that asks, “Which of the following best represents how you think of yourself?” with responses including gay or lesbian; straight, that is not gay or lesbian; bisexual; something else; or I don’t know.<sup>20</sup> The Department of Defense P1 Survey also includes a question on sexual orientation that asks, “How do you describe your sexual orientation? (Select all that apply.),” with responses including

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<sup>19</sup> For example, see the demographics reporting guidance of the Emergency Rental Assistance Program, starting on page 16, available at <https://home.treasury.gov/system/files/136/ERA-Reporting-Guidance-v2.pdf>.

<sup>20</sup> U.S. Census Bureau, *Phase 3.3 Household Pulse Survey*, available at [https://www2.census.gov/programs-surveys/demo/technical-documentation/hhp/Phase3-3\\_Questionnaire\\_12\\_01\\_21\\_English.pdf](https://www2.census.gov/programs-surveys/demo/technical-documentation/hhp/Phase3-3_Questionnaire_12_01_21_English.pdf).



heterosexual or straight; lesbian or gay; bisexual, pansexual, or queer; questioning, asexual, demisexual; other; and prefer not to answer.<sup>21</sup> The U.S. Department of Agriculture's Farm Producer Study includes a question on sexual orientation that asks, "Which of the following best represents how you think of yourself?" with responses including gay or lesbian; straight, that is, not gay or lesbian; bisexual; none of these, specify (with a space to write in); I am not sure yet; and I don't know what this question means.<sup>22</sup> Treasury's approach is generally consistent with these approaches, and most consistent with the Census Bureau's Household Pulse Survey, but Treasury's reporting does not include a response indicating that the individual does not know their sexual orientation, in part because responses from individual small business owners are not required by beneficiaries to receive funding. Treasury's decision to include an option for "prefer not to respond" is consistent with the Department of Defense's P1 Survey's option of "prefer not to answer." As businesses may elect to not choose any of the aforementioned responses by leaving the responses blank, Treasury also provides jurisdictions the option to report "the business did not answer."

Treasury will collect information about race and ethnicity statuses with which principal owners identify, consistent with the Office of Management and Budget (OMB) Standards for the Classification of Federal Data on Race and Ethnicity, which govern how questions about race and ethnicity should be asked on all federal collections. There are two ethnicity categories (Hispanic or Latino; and Not Hispanic or Latino) and five minimum race categories (American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; and White).<sup>23</sup> Further disaggregation is allowable. For example, many Census Bureau surveys, as well as the Department of Health and Human Services' (HHS) approach for collecting data for its population studies, offer checkboxes for selected disaggregated categories

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<sup>21</sup> Department of Defense, *P1 Survey*, available at <https://www.reginfo.gov/public/do/DownloadDocument?objectID=112827001>.

<sup>22</sup> U.S. Department of Agriculture, 2021 Farm Producer Study, available at <https://omb.report/icr/202109-0535-001/doc/114843800>.

<sup>23</sup> Off. of Mgmt. & Budget, Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 FR 58782, 58782-90 (Oct. 30, 1997).

for Asian (i.e., Asian Indian; Chinese; Filipino; Japanese; Korean; Vietnamese; and Other Asian) as well as for Native Hawaiian or Other Pacific Islander (i.e., Native Hawaiian; Chamorro; Samoan; and Other Pacific Islander).<sup>24</sup> The 2020 Census offered respondents the opportunity to, under each of the minimum categories, write in additional specifics. Both minimum categories and disaggregated categories of race and ethnicity are used in the data collection under the Home Mortgage Disclosure Act (HMDA).<sup>25</sup> The HMDA data collection also permits individuals to answer with “I do not wish to provide this information.”<sup>26</sup>

Treasury believes that collecting only the OMB minimum categories of race may mask the effects of SSBCI funds on businesses in jurisdictions with a large population of one OMB minimum category of race and multiple populations of categories of race, and therefore hinder the understanding of program outcomes in these jurisdictions. Thus, this interim final rule provides for the reporting of information consistent with the OMB data collection standard, using the five minimum race categories, in addition to disaggregating the Asian and Native Hawaiian or Other Pacific Islander categories, which is consistent with the approaches used by HHS and the Census Bureau’s American Community Survey. Treasury will collect information on ethnicity consistent with the OMB data collection standard’s minimum ethnicity categories. For both the race and ethnicity information collection, Treasury is providing a response option of “prefer not to respond,” consistent with the HMDA data collection’s “I do not wish to provide this information.” As businesses may elect not to respond by leaving the information request blank, Treasury also provides jurisdictions the option to report “the business did not answer.”

Treasury also believes that it is important to collect information on those that identify as Middle Eastern or North African to understand whether SSBCI funds are reaching businesses principally owned by such individuals. Currently, people of Middle Eastern or North African

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<sup>24</sup> See Informational Copy of the U.S. 2020 Census, U.S. Census Bureau, [https://www2.census.gov/programs-surveys/decennial/2020/technical-documentation/questionnaires-and-instructions/questionnaires/2020-informational-questionnaire-english\\_DI-Q1.pdf](https://www2.census.gov/programs-surveys/decennial/2020/technical-documentation/questionnaires-and-instructions/questionnaires/2020-informational-questionnaire-english_DI-Q1.pdf).

<sup>25</sup> See 12 CFR part 1003, appendix B (Form and Instructions for Data Collection on Ethnicity, Race, and Sex).

<sup>26</sup> See *id.*

ancestry are categorized as White under OMB data collection standards. Because Treasury must comply with these standards, Treasury is collecting information about Middle Eastern or North African ancestry through a separate ancestry question. Finally, this interim final rule requires jurisdictions to submit the required information using the format specified on Treasury's website.<sup>27</sup>

We welcome comment on any aspect of this interim final rule.

### **III. Regulatory Analyses**

#### *Executive Orders 12866 and 13563*

Executive Orders 12866 and 13563 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This interim final rule has been designated a "significant regulatory action," although not economically significant, under section 3(f) of Executive Order 12866. As explained above, this interim final rule institutes reporting requirements to implement, determine compliance with, and understand the program outcomes of SSBCI, as reauthorized and amended by ARPA. As these reporting requirements focus only on data collection, this interim final rule is not economically significant. However, we welcome comments on the economic impact of this interim final rule. Particularly, Treasury welcomes comments and data on how this interim final rule may substantively affect the SSBCI program.

#### *Executive Order 13132*

Executive Order 13132 (entitled Federalism) prohibits an agency from publishing any rule that has federalism implications if this interim final rule either imposes substantial, direct compliance costs on state, local, and Tribal governments, and is not required by statute, or

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<sup>27</sup> See 12 U.S.C. 5706(c).

preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. This interim final rule does not have federalism implications within the meaning of the Executive order and does not impose substantial, direct compliance costs on state, local, and Tribal governments or preempt state law within the meaning of the Executive order. The compliance costs are imposed on state, local, and Tribal governments by the Small Business Jobs Act, as amended by ARPA. Notwithstanding the above, Treasury has engaged in efforts to consult with affected state, local, and Tribal government officials and associations in the process of developing this interim final rule. Pursuant to the requirements set forth in section 8(a) of Executive Order 13132, Treasury certifies that it has complied with the requirements of Executive Order 13132.

*Paperwork Reduction Act, 44 U.S.C. Chapter 35*

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521) (PRA) states that no agency may conduct or sponsor, nor is the respondent required to respond to, an information collection unless it displays a currently valid OMB control number.

This interim final rule will add annual reporting requirements. These collections will increase total annual burden by 13,050 hours: The requirements are expected to take 500 jurisdictions 26.10 hours to complete for an annual burden of 13,050 hours. Using the standard total compensation for accountants and auditors, the estimated cost of this information collection is \$673,902.<sup>28</sup>

The OMB Control Number for the SSBCI information collection is 1505-0227.

Comments concerning the collections of information should be directed to the Office of Recovery Programs, Department of the Treasury, 1500 Pennsylvania Avenue NW, Washington,

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<sup>28</sup> See Bureau of Labor Statistics, U.S. Department of Labor, Occupational Outlook Handbook, Accountants and Auditors, on the internet at <https://www.bls.gov/oes/current/oes132011.htm>. Base wage of \$35.37/hour increased by 46 percent to account for fully loaded employer cost of employee compensation (benefits, etc.) for a fully loaded wage rate of \$51.64. 13,050 multiplied by \$51.64 equals \$673,902.

DC 20220. Treasury welcomes comments on the compliance burdens for the information collection under this interim final rule.

#### *Congressional Review Act*

The Administrator of OMB's Office of Information and Regulatory Affairs (OIRA) has determined that this is not a major rule for purposes of Subtitle E of the Small Business Regulatory Enforcement and Fairness Act of 1996 (also known as the Congressional Review Act or CRA) (5 U.S.C. 804(2) *et seq.*). Under the CRA, a major rule takes effect 60 days after the rule is published in the Federal Register. 5 U.S.C. 801(a)(3).

#### *Administrative Procedure Act*

The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, generally requires public notice and an opportunity for comment before a rule becomes effective. However, the APA provides that the requirements of 5 U.S.C. 553 do not apply "to the extent that there is involved . . . a matter relating to agency . . . grants . . . or contracts." This interim final rule is being issued for purposes of implementation, compliance, and understanding the outcomes of the SSBCI program. While SSBCI capital funds are not considered federal financial assistance for the purposes of 31 U.S.C. subtitle V under the SSBCI statute, the SSBCI program resembles other coronavirus relief programs that Treasury is implementing. SSBCI capital funds will be disbursed to eligible jurisdictions that apply in order to establish small business lending and investment programs. This interim final rule sets forth the "process necessary to maintain. . . eligibility for federal funds," *id.*, as well as the "method[s] by which [jurisdictions] can . . . qualify for federal aid," and other "integral part[s] of the grant program," *Center for Auto Safety v. Tiemann*, 414 F. Supp. 215, 222 (D.D.C. 1976). Eligible jurisdictions must submit the annual information required by this interim final rule in Treasury's prescribed format to remain eligible for SSBCI capital funding. Treasury will also use the reported data to determine whether jurisdictions are eligible for the SEDI incentive allocation. As a result, the requirements of 5 U.S.C. 553 do not apply.

The APA also provides an exception to notice-and-comment procedures “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. 553(b)(3)(B); *see also* 5 U.S.C. 553(d)(3) (creating an exception to the requirement of a 30-day delay before the effective date of a rule “for good cause found and published with the rule”). Even if 5 U.S.C. 553 applied, Treasury would have good cause under sections 553(b)(3)(B) and 553(d)(3) for not complying with these requirements under section 553. ARPA is a law responding to a historic economic and public health emergency; it is “extraordinary” legislation about which “both Congress and the President articulated a profound sense of ‘urgency.’” *Petry v. Block*, 737 F.2d 1193, 1200 (D.C. Cir. 1984). In addition, there is an urgent need for jurisdictions to undertake the planning necessary to implement their SSBCI capital programs. Developing these programs requires an understanding of all the program requirements, including the data collection and reporting requirements implemented in this interim final rule. These requirements are immediately effective but may change when the rule is finalized. Without having clarity on how the SSBCI program requirements will interact with existing restrictions on lenders’ and other financial entities’ availability to collect this data, jurisdictions may have difficulty attracting lenders and other financial entities to implement SSBCI programs, which could hinder their efforts to deploy the allocation for SEDI-owned and controlled businesses as Congress intended. Treasury understands that many jurisdictions require immediate rules on which they can rely in order to develop sound SSBCI programs. The statutory urgency and practical necessity are good cause to forego the ordinary requirements of notice-and-comment rulemaking.

#### *Regulatory Flexibility Analysis*

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule, or a final rule pursuant to section 553(b) of the Administrative Procedure Act or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements

of the RFA and publish such analysis in the Federal Register. 5 U.S.C. 603, 604. Rules that are exempt from notice and comment under the APA are also exempt from the RFA requirements, including the requirement to conduct a regulatory flexibility analysis. Since this interim final rule is exempt from the notice and comment requirements of the APA, Treasury is not required to conduct a regulatory flexibility analysis.

### **List of subjects in 31 CFR Part 35**

Executive compensation, Public health emergency, State and local governments, Tribal governments.

For the reasons stated in the preamble, the Department of the Treasury amends 31 CFR part 35 as follows:

### **PART 35—PANDEMIC RELIEF PROGRAMS**

1. The authority citation for part 35 is revised to read as follows:

Authority: 42 U.S.C. 802(f); 42 U.S.C. 803(f); 31 U.S.C. 321; 12 U.S.C. 5701-5710; Division N, Title V, Subtitle B, Pub. L. 116-260, 134 Stat. 1182 (12 U.S.C. 4703a); Section 104A, Pub. L. 103-325, 108 Stat. 2160, as amended (12 U.S.C. 4701 et seq.); Pub. L. 117-2, 135 Stat. 4 (42 U.S.C. 802 et seq.).

2. Add subpart C to read as follows:

### **Subpart C—State Small Business Credit Initiative Small Business Owners Demographics**

#### **Data Collection**

Sec.

35.26 Authority, scope, and purpose.

35.27 Definitions.

35.28 Annual report requirements.

35.29 Format.

### **§ 35.26 Authority, scope, and purpose.**

(a) *Authority and scope.* This subpart is issued by the U.S. Department of the Treasury pursuant to Sections 3007 and 3010 of the Small Business Jobs Act of 2010, as amended by the American Rescue Plan Act of 2021 (12 U.S.C. 5706, 5709).

(b) *Purpose.* The U.S. Department of the Treasury is collecting demographics-related data regarding those who own or control businesses that receive a loan, investment, other credit or equity support, or technical assistance under the State Small Business Credit Initiative for purposes of implementation, compliance, and understanding program outcomes.

### **§ 35.27 Definitions.**

In this subpart:

(a) *Controlling influence over a business* means having the power to control, manage, or direct the business. A person is presumed to have a controlling influence over a business if the person is a senior executive officer or senior manager of the business (e.g., Chief Executive Officer, Chief Financial Officer, Chief Operating Officer), or any other individual who regularly performs similar functions.

(b) *Jurisdiction* means:

- (1) One of the fifty states of the United States;
- (2) The District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of Northern Mariana Islands, Guam, American Samoa, and the United States Virgin Islands;
- (3) When designated by one of the fifty states of the United States, a political subdivision of that state that the U.S. Department of the Treasury determines has the capacity to participate in the State Small Business Credit Initiative;
- (4) Under the circumstances described in 12 U.S.C. 5703(d), a municipality of one of the fifty states of the United States to which the U.S. Department of the Treasury has given a special permission under 12 U.S.C. 5703(d); and



(5) A Tribal government or a group of Tribal governments that jointly apply to be approved by the U.S. Department of Treasury to participate in the State Small Business Credit Initiative as a single participating jurisdiction.

(c) *Minority individual* means a natural person who identifies as American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; or Hispanic or Latino/a; or one or more than one of these groups.

(d) *Minority-owned or controlled business* means a business that:

- (1) If privately owned, 51 percent or more is owned by minority individuals;
- (2) If publicly owned, 51 percent or more of the stock is owned by minority individuals;
- (3) In the case of a mutual institution, a majority of the board of directors, account holders, and the community which the institution services is predominantly comprised of minority individuals; or
- (4) One or more minority individuals have the power to exercise a controlling influence over the business.

(e) *Participating jurisdiction* means a jurisdiction that has been approved by the U.S. Department of the Treasury for participation in the State Small Business Credit Initiative.

(f) *Principal owner* of a business means a natural person who directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, owns 25 percent or more of the equity interests of the business. If a trust owns, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, 25 percent or more of the equity interests of the business, the trustee is a principal owner.

(g) *Socially and economically disadvantaged individual (SEDI) demographics-related business* means a business owned and controlled by individuals who have had their access to credit on reasonable terms diminished compared to others in comparable economic circumstances, due to their:

(1) Membership of a group that has been subjected to racial or ethnic prejudice or cultural bias within American society;

(2) Gender;

(3) Veteran status;

(4) Limited English proficiency;

(5) Disability;

(6) Long-term residence in an environment isolated from the mainstream of American society;

(7) Membership of a federally or state-recognized Indian Tribe;

(8) Long-term residence in a rural community;

(9) Residence in a U.S. territory;

(10) Residence in a community undergoing economic transitions (including communities impacted by the shift towards a net-zero economy or deindustrialization); or

(11) Membership of an *underserved community*.

(i) *Underserved communities* are populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life, as exemplified by the list in the definition of *equity* in paragraph (g)(11)(ii) of this section; and

(ii) *Equity* is consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders, and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.

(12) For purposes of this paragraph (g), a business is “owned and controlled” by applicable individuals:

- (i) If privately owned, 51 percent or more is owned by such individuals;
- (ii) If publicly owned, 51 percent more or of the stock is owned by such individuals; and
- (ii) In the case of a mutual institution, if a majority of the board of directors, account holders, and the community which the institution services is predominantly comprised of such individuals.

(h) *Veteran-owned or controlled business* means a business that:

- (1) If privately owned, 51 percent or more is owned by veterans;
- (2) If publicly owned, 51 percent or more of the stock is owned by veterans;
- (3) In the case of a mutual institution, a majority of the board of directors, account holders, and the community which the institution services is predominantly comprised of veterans; or
- (4) One or more individuals who are veterans have the power to exercise a controlling influence over the business.

(i) *Women-owned or controlled business* means a business that:

- (1) If privately owned, 51 percent or more is owned by females;
- (2) If publicly owned, 51 percent or more of the stock is owned by females;
- (3) In the case of a mutual institution, a majority of the board of directors, account holders, and the community which the institution services is predominantly comprised of females; or
- (4) One or more individuals who are females have the power to exercise a controlling influence over the business.

### **§ 35.28 Annual report requirements.**

By March 31 of each year beginning March 31, 2023, and ending with the report to be submitted on March 31, 2028, each participating jurisdiction shall submit to the U.S. Department

of the Treasury an annual report that includes, with respect to the previous calendar year, the following data for each business that receives a loan, investment, other credit or equity support, or technical assistance as part of the State Small Business Credit Initiative. For each business that receives a loan, investment, or other credit or equity support under the State Small Business Credit Initiative, the reported data shall be based on the ownership and control of the business immediately before the consummation of such loan, investment, or other credit or equity support-related transaction. For each business that receives technical assistance under the State Small Business Credit Initiative, the reported data shall be based on the ownership and control of the business at the time it receives such technical assistance.

(a) *Self-certified SEDI demographics-related business status.* (1) Indicate which one or more of the following categories apply: self-certified due to membership of a group that has been subjected to racial or ethnic prejudice or cultural bias within American society; self-certified due to gender; self-certified due to veteran status; self-certified due to limited English proficiency; self-certified due to disability; self-certified due to long-term residence in an environment isolated from the mainstream of American society; self-certified due to membership of a federally or state-recognized Indian Tribe; self-certified due to long-term residence in a rural community; self-certified due to residence in a U.S. territory; self-certified due to residence in a community undergoing economic transitions (including communities impacted by the shift towards a net-zero economy or deindustrialization); self-certified due to membership of an “underserved community” as defined in § 35.27(g)(11)(i); none of the preceding categories are applicable; prefer not to respond; or the business did not answer.

(2) The participating jurisdiction must permit each business to identify all of the categories that apply in the definition of SEDI demographics-related business, and the participating jurisdiction must report to Treasury all categories identified by the business.

(b) *Minority-owned or controlled business status.* Indicate whether the business is a minority-owned or controlled business. The participating jurisdiction must indicate yes; no; prefer not to respond; or that the business did not answer.

(c) *Women-owned or controlled business status.* Indicate whether the business is a women-owned or controlled business. The participating jurisdiction must indicate yes; no; prefer not to respond; or that the business did not answer.

(d) *Veteran-owned or controlled business status.* Indicate whether the business is a veteran-owned or controlled business. The participating jurisdiction must indicate yes; no; prefer not to respond; or that the business did not answer.

(e) *Race of principal owners.* (1) For each principal owner of the business, indicate which one or more of the following race categories (including the Office of Management and Budget's minimum categories and the relevant disaggregated categories) with which the principal owner identifies: American Indian or Alaska Native; Asian; Asian disaggregated categories: Indian, Chinese, Filipino, Japanese, Korean, Vietnamese, Asian (Other); Black or African American; Native Hawaiian or Other Pacific Islander; Native Hawaiian or Other Pacific Islander disaggregated categories: Guamanian or Chamorro, Native Hawaiian, Samoan, Pacific Islander (Other); White; prefer not to respond; or that the business did not answer.

(2) The participating jurisdiction must permit each business to identify all of the Office of Management and Budget's minimum categories and disaggregated categories in paragraph (e)(1) of this section with which each principal owner of the business identifies, and the participating jurisdiction must report to Treasury all categories identified by the business.

(f) *Ethnicity of principal owners.* For each principal owner of the business, indicate which of the following ethnicity categories the principal owner identifies with: Hispanic or Latino/a; not Hispanic or Latino/a; prefer not to respond; or that the business did not answer.

(g) *Middle Eastern or North African Ancestry of principal owners.* For each principal owner of the business, indicate which of the following ancestry categories the principal owner identifies with: Middle Eastern or North African; not Middle Eastern or North African; prefer not to respond; or that the business did not answer.

(h) *Gender of principal owners.* For each principal owner of the business, indicate which of the following gender categories the principal owner identifies with: female; male; nonbinary; prefer to self-describe, prefer not to respond; or that the business did not answer. If the “prefer to self-describe” option is chosen, the participating jurisdiction must provide an option for the business to write in the gender and must report what the business writes in.

(i) *Sexual orientation of principal owners.* For each principal owner of the business, indicate which of the following sexual orientation categories the principal owner identifies with: gay or lesbian; bisexual; straight, that is, not gay, lesbian, or bisexual; something else; prefer not to respond; or that the business did not answer.

(j) *Veteran status of principal owners.* For each principal owner of the business, indicate which of the following categories the principal owner identifies with: veteran; non-veteran; prefer not to respond; or that the business did not answer.

#### **§ 35.29 Format.**

Participating jurisdictions must submit the information required under § 35.28 using the formats specified from time to time on the U.S. Department of the Treasury’s website.

**Jacob Leibenluft,**  
*Chief Recovery Officer.*

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